Court, U.S.
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No. 10-161

In The

Supreme Court of the United States

ROMEL VALENTINO WHITE,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether California's uncertain timeliness requirement for seeking state habeas corpus relief is a "condition for filing," such that a state court finding of untimeliness precludes a later federal habeas petition, or only a condition for obtaining relief, permitting the federal district court to grant statutory tolling of the federal statute of limitations for the time Petitioner's otherwise properly filed state habeas petition was pending in the state court.

PARTIES TO THE PROCEEDING

The only parties to this proceeding are Petitioner himself and the State, represented by the California Attorney General.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, ROMEL VALENTINO WHITE, respectfully prays that a Writ of Certiorari issue to review the judgment of the Ninth Circuit Court of Appeals, No. 08-16387, March 19, 2010, affirming the dismissal of his habeas corpus petition. Petitioner's petition for rehearing and rehearing *en banc* was denied by the Court of Appeals on May 3, 2010.

OPINIONS BELOW

Attached to this Petition are: the Order and Opinion of the Circuit Court of Appeals, publication order April 7, 2010 (No. 08-16387; App. 1); the Order of the District Court dismissing the Petition as untimely on May 30, 2008 (2:06-cv-2840; App. 7); the Findings and Recommendations filed in the District Court on February 19, 2008 (2:06-cv-2840; App. 17); the opinion of the Sacramento County Superior Court, filed January 6, 2006, denying the state habeas petition (No. 05F10226; App. 24); Denial of Rehearing and Rehearing En Banc on May 3, 2010 (No. 08-16387; App. 36).

STATEMENT OF JURISDICTION

This Court has jurisdiction on certiorari pursuant to 28 U.S.C. § 1254. The district court had jurisdiction in habeas corpus under 28 U.S.C. § 2254. The

Court of Appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 2253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition concerns the proper interpretation of 28 U.S.C. § 2244(d)(1), which provides that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court," and the proper interpretation of subdivision (d)(2), which states that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

Under state law, the petition for writ of habeas corpus is created by Cal. Penal Code §§ 1473 et seq. That statutory scheme provides no time limit for filing.

STATEMENT OF THE CASE

Petitioner has been denied federal review of his federal constitutional claims because his federal claims were not earlier presented in the California Superior Court.

The California Supreme Court denied review in his direct appeal (S127709) on October 13, 2004.

Petitioner's appellate attorney, Danny Davis, failed to even inform Petitioner of the denial of review, much less assist him in preparing a federal habeas petition. Mr. Davis was subsequently suspended from practice by the California State Bar, with specific reference to his failure to communicate with Petitioner in this very matter. See State Bar Court of California, Stipulation and Modification, In the Matter of Daniel M. Davis, no. 07-O-13321.[1]

When he found out that he had been abandoned by Mr. Davis, Petitioner secured new counsel. After research and investigation additional grounds for post-conviction relief were discovered. A habeas corpus petition was filed in Sacramento County Superior Court on November 16, 2005, about thirteen months after the denial of review in the direct appeal. Based on recent past experience, it appeared to counsel that a thirteen month delay was not excessive and the state petition should not be deemed untimely.[2]

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[1] The Circuit Court of Appeals took judicial notice of this state bar record. Needless to say, the attorney misfeasance here bears comparison to the situation in this Court's recent opinion, *Holland v. Florida,* 2010 U.S. LEXIS 4946, opinion filed June 14, 2010 [equitable tolling available in federal habeas corpus for attorney misfeasance].

[2] See an earlier state habeas ruling, *In re Adam Gray*, case no. 04F07449, subject to judicial notice by the Circuit Court of Appeals. In the *Gray* matter the Sacramento Superior Court found no unreasonable delay in a habeas petition which was

(Continued on following page)

However, the state superior court concluded otherwise; the state petition was deemed untimely in an opinion filed January 6, 2006 (see Attachment A).

Meanwhile, on October 6, 2005, the Circuit Court of Appeals announced its decision in *Bonner v. Carey,* 425 F.3d 1145 (9th Cir. 2005). The *Bonner* decision overruled earlier circuit authority, that had deemed California's timeliness rule too uncertain and permitted statutory tolling for the period an otherwise properly filed habeas petition was pending in the state superior court. *Bonner* held for the first time that the California habeas corpus "timeliness rule" resembles a "time limit," whose violation bars subsequent federal relief under *Pace v. DiGuglielmo,* 544 U.S. 408 (2005).

In the absence of tolling, Petitioner's federal statute of limitations ran out on January 11, 2006, five days after the state superior court first announced that his state habeas petition was untimely. Petitioner then sought habeas relief in the California Court of Appeal and the California Supreme Court.

Petitioner immediately filed a federal habeas corpus petition. His petition was dismissed for lack of statutory tolling during the period his state habeas

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filed fourteen months after the denial of review in the direct appeal. For the irregular application of the California timeliness rule, see the record in *Walker v. Morris,* No. 09-996, certiorari review granted on June 21, 2010.

petitions were pending in state court, due to the state court finding of untimeliness.

The federal district court proceedings, as well as the federal appeal and this Petition, present the following question: whether a state court habeas petition is "properly filed" under 28 U.S.C. § 2244(d)(2), and thus tolls the federal statute of limitations, even though a state habeas court later deems the state petition untimely under a state procedure which lacks its own time limit and whose operation is vague and uncertain.

SUMMARY

The implications of California's scheme for habeas corpus review, which lacks a time limit or statute of limitations, have come before this Court in the past, specifically in the context of statutory tolling under 28 U.S.C. § 2244(d)(2). See *Carey v. Saffold,* 536 U.S. 214 (2002) and *Evans v. Chavis,* 546 U.S. 189 (2006), both dealing with "gap tolling," i.e. delay between successive habeas corpus filings at different levels of review in the California state court system.

Apart from statutory tolling, there is a related issue of procedural default for lack of timely filing in state habeas proceedings. This issue typically arises when the petitioner files a timely federal habeas petition, but has a concurrent state habeas petition pending for exhaustion purposes. If the state petition is filed late and violates a state time limit, the federal

claim based on that exhaustion petition may be procedurally defaulted.

However, for cases arising from California courts, which operate under no time limit, the state finding of untimeliness may not operate as a procedural default. The Ninth Circuit has held that the California timeliness rule is too "vague and uncertain" to operate as a procedural bar to a properly filed federal habeas petition. *Townsend v. Knowles,* 562 F.3d 1200, 1206 (9th Cir. 2009).

On June 21, 2010, this Court accepted certiorari review in *Walker v. Morris,* No. 09-996. The issue stated in California's petition in *Walker v. Morris* is whether California state court findings of "substantial delay" are inadequate to support a procedural bar in federal court merely because the California rule is vague and inconsistently applied.

The recurrent issue raised by Mr. White's petition concerns statutory tolling. This issue is related to but distinct from procedural default, and has not been resolved under *Carey v. Saffold* or *Evans v. Chavis, supra,* which dealt only with statutory tolling between (not prior to) California state habeas petitions.

This Court has held that for states that have a time limit, the state court finding of untimeliness is binding on the federal habeas court and prevents statutory tolling for the period that the state petition was pending. *Pace v. DiGuglielmo,* 544 U.S. 408 (2005). The state court ruling is binding on the federal court even if there are exceptions built into

the state time limit. *Ibid.* The state court ruling is also binding on the federal court even if the statute of limitations is itself an "affirmative defense" under state law. *Allen v. Siebert,* 552 U.S. 3, 6 (2007). And, the state court finding of untimeliness is binding even if the state court had discretion to ignore the state time limit. *Beard v. Kindler,* 130 S.Ct. 612 (2009).

However, this Court has not determined whether the *Pace* "time limit" rule extends to statutory tolling of federal habeas petitions from California, which has no time limit. The Ninth Circuit accepted the *Pace* rule in cases from California despite the lack of a time limit, see *Bonner v. Carey,* 425 F.3d 1145 (9th Cir. 2005). It is the *Bonner* conclusion which led to the dismissal of Petitioner's federal petition, and it is the *Bonner* conclusion which Petitioner challenges before this Court.

The *Bonner* court recognized "the harshness of the result of our decision." 425 F.3d at 1149. But the *Bonner* decision is unfair in a way that the *Pace* decision is not: under the California rule a petitioner may be frozen out of federal court by application of a state timeliness rule which is utterly unpredictable.

For these reasons *Bonner v. Carey, supra,* was wrongly decided. Federal jurisdiction should not be precluded or defeated by a state procedural rule which is unpredictable and fails to give notice to petitioners, and which in the worst case could be cynically manipulated to hide official misconduct and deny otherwise meritorious federal claims. *Pace*

should not apply where there is no state time limit, and statutory tolling should be permitted here.

ARGUMENT

STATUTORY TOLLING MUST BE PERMITTED UNDER 28 U.S.C. § 2244(d)(2) WHERE THERE IS NO STATE TIME LIMIT AND THE STATE HABEAS PETITION WAS OTHERWISE PROPERLY FILED.

California has no time limit for filing a petition for habeas corpus relief. Timeliness is not a condition for filing a state habeas petition, therefore the state cannot rely on its timeliness rule to argue that the state petition was not properly filed. The panel opinion in *Bonner v. Carey, supra,* was wrongly decided. This Court's rule in *Pace v. DiGuglielmo, supra,* should not be extended to federal habeas petitions from states which lack a time limit. To do so would deny notice and work an unjust burden on habeas petitioners.

"[T]he question whether an application has been 'properly filed' is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." *Artuz v. Bennett*, 531 U.S. 4, 9 (2000). A habeas petition is properly filed "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings," including "the time limits upon its delivery." *Id.* at 8.

Consistent with the language of *Artuz v. Bennett, supra,* the opinion in *Pace v. DiGuglielmo, supra,* speaks repeatedly in terms of state time limits or statutes of limitations: "In common understanding, a petition filed after a *time limit*, and which does not fit within any exceptions to that limit, is no more 'properly filed' than a petition filed after a *time limit* that permits no exception." 544 U.S. at 413. " . . . The dissent ignores the fact that *Artuz* itself distinguished between *time limits* and procedural bars." *Id.* at 417. " . . . For these reasons, we hold that *time limits*, no matter their form, are 'filing' conditions." *Ibid.* (Italics added.) Similarly, the *Pace* dissent framed the issue as arising from a "statute of limitations." *Id.* at 420, 422.

The necessity of a state time limit was driven home again in *Allen v. Siebert,* 552 U.S. 3, 6 (2007): " . . . our holding in *Pace* turned not on the nature of the particular time limit relied upon by the state court, but rather on the fact that time limits generally establish 'conditions to filing' a petition for state postconviction relief. Whether a time limit is jurisdictional, an affirmative defense, or something in between, it is a 'condition to filing,' *Artuz, supra*, at 9, 121 S.Ct. 361, 148 L. Ed. 2d 213 – it places a limit on how long a prisoner can wait before filing a postconviction petition."

California's timeliness rule is not a time limit. It is not a condition to filing.

California has no "time limit" for filing habeas corpus petitions, within the meaning of *Pace*. Therefore the *Pace* decision does not reach the California procedure, and does not determine this issue. The opinion in *Bonner v. Carey, supra,* tacitly assumed that California's habeas procedure contains a "time limit" which is a "condition for filing" under *Pace*. This is an incorrect assumption.

There are "conditions for filing" in California, which are necessary preconditions for the court clerk to accept a habeas petition for filing. One condition for filing is the requirement of verification. Without a signed verification of the petition, the clerk will not accept the petition for filing. If the state court clerk or a state reviewing court dismisses the petition for lack of a verification, this is a condition for filing subject to conclusive effect in federal court. See *Zepeda v. Walker*, 581 F.3d 1013, 1018 (9th Cir. 2009). The verification requirement is stated in the California Penal Code (§ 1474) and appears on the standard court forms, and there is no lack of notice of the requirement.

Time limits are also conditions for many filings in California, though not for habeas corpus petitions. For instance, there is a 60-day time limit for filing a notice of appeal from a criminal judgment. Under Rule 8.308(d), Cal. Rules of Court, when a late notice of appeal is received by the superior court clerk, the clerk must mark the notice of appeal "Received [date] but not filed," and notify the appealing party that the

notice was not filed because it was late.[3] This is a "condition to filing" for an operative appeal.

If there were a time limit for habeas petitions in California, that time limit would be a condition for filing under the *Pace* decision. The time limit would determine whether the state petition was properly filed under 28 U.S.C. § 2244(d)(2).

But there is no time limit for filing habeas petitions in California, hence in California there is no filing condition based on timeliness.[4]

California's timeliness rule is more like the common law rule of *laches*. *Laches,* broadly defined, is the failure to prosecute a claim within a reasonable period, such as to constitute acquiescence or work an unreasonable hardship on the opposing party. See *Black's Law Dictionary,* Rev. 4th Ed. And see *Pace v. DiGuglielmo, supra,* 544 U.S. at 419 [petitioner waited ten years before advancing his habeas claim], in turn citing *Irwin v. Department of Veterans Affairs,*

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[3] "(d) Late notice of appeal. The superior court clerk must mark a late notice of appeal 'Received [date] but not filed,' notify the party that the notice was not filed because it was late, and send a copy of the marked notice of appeal to the district appellate project."

[4] Significantly, California's almost identical timeliness rule for filing a petition for writ of error coram nobis "is plainly 'a condition to obtaining relief' and not 'a condition to filing.' See *Artuz v. Bennett,* 531 U.S. 4 (2000)." *Ramirez v. Yates,* 571 F.3d 993, 999 (9th Cir. 2009).

498 U.S. 89 (1990) [lack of "due diligence"] and *McQuiddy v. Ware,* 87 U.S. 14 (1874) ["gross laches"].

Under *In re Clark,* 5 Cal.4th 750 (1993) and *In re Robbins,* 18 Cal.4th 770 (1998), the habeas petitioner must show that the petition was filed without "substantial delay," which requires a showing of "due diligence," very much like a *laches* determination. See *In re Clark, supra,* at 775: "A petitioner will be expected to demonstrate due diligence in pursuing potential claims." And see *In re Robbins, supra,* at 780 ["Good cause for substantial delay may be established if, for example, the petitioner can demonstrate that because he or she was conducting an *ongoing investigation* into at least one potentially meritorious claim. . . .].

Under *In re Clark* and *In re Robbins* the "substantial delay" determination is a global determination based primarily on the perceived "due diligence" of the inmate in bringing forth his claim, and most definitely including the "time and circumstances" in which new evidence was discovered.[5] This is a far cry

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[5] The reasons for the thirteen-month delay in petitioner's state habeas filing were stated in his state petition, but were disregarded by the state and federal courts. All of the claims raised in his federal habeas petition had to be developed and exhausted during the period just prior to his first filing in state court. It was necessary to investigate and research those evidentiary claims. Witnesses, who had been in fear and were reluctant to cooperate, signed declarations.

from the time limit which was deemed a filing condition in *Pace.*

Yet, according to the *Bonner* opinion, "Under *Pace,* if the petition was untimely under California law, it was never properly filed." 425 F.3d at 1149. This is not an accurate construction of California law or the *Pace* decision; the *Pace* decision applied to a state which had a time limit, unlike California. The California timeliness rule requires the post-conviction reviewing court to consider, after the filing is accepted, all the circumstances surrounding the timing of the filing. The process is much like the determination of *laches* in civil litigation. Therefore the California timeliness rule is a "condition for review" in the language of *Artuz v. Bennett, supra,* and not a "condition for filing" in the language of *Pace v. DiGuglielmo, supra.*

The *Bonner* opinion, echoing *Pace,* acknowledges that its result is "harsh." But the result in *Bonner* is unjust in a way that the *Pace* result is not. In a time limit state the habeas petitioner is at least on notice that there is a state time limit which must be met, and which the federal courts will later treat as a condition of filing. In California, the habeas petitioner has no notice of what the state court may or may not consider "substantial delay."

In *Pace v. DiGuglielmo, supra,* 544 U.S. at 416, the Court suggested that a prisoner who is in doubt about his state statute of limitations may try to use the "stay and abeyance" procedure of *Rhines v. Weber,*

544 U.S. 269 (2005). "A prisoner seeking state post-conviction relief might avoid this predicament, however, by filing a 'protective' petition in federal court and asking the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted." *Ibid.*

However, stay and abeyance is not a reliable substitute where the federal court must itself guess about whether the state court petition is timely, or how long the federal petition must be held in abeyance. For instance, federal constitutional claims in a state habeas petition which turns out to be both timely and meritorious might have to be held in abeyance for years in a concurrent federal petition.

The *Rhines* opinion itself emphasizes that stay and abeyance is an exceptional or extraordinary remedy, not to be taken for granted. " . . . [S]tay and abeyance should be available only in limited circumstances. . . . Even where stay and abeyance is appropriate, the district court's discretion in structuring the stay is limited by the timeliness concerns reflected in AEDPA." 544 U.S. at 277. It is not likely that the federal court will hold the federal petition in abeyance for up to a year or more while the state courts ponder both the constitutional merits and whether the state petition violated the state timeliness rule.[6]

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[6] See, e.g., *Gutierrez v. Sisto,* E.D. Cal. No. 2:08-CV-02368-CMK, which the Circuit Court of Appeals took judicial notice of.

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California's timeliness rule is a condition for relief under *Artuz v. Bennett, supra.* It is not a condition for filing under *Pace v. DiGuglielmo, supra.* On a continuing basis, California inmates are subject to the dismissal of meritorious federal claims simply because a state court decided, without warning or notice or any clear guideline, that the state habeas petition was untimely.

Certiorari review is necessary to distinguish California habeas corpus procedure from time limit/filing condition decisions of this Court such as *Pace*, and to declare that for purposes of 28 U.S.C. § 2244(d)(2), California's timeliness rule is a condition for review, insufficient to automatically block statutory tolling of the federal statute of limitations.

On July 21, 2009, the district court denied stay and abeyance and dismissed the federal petition, based on a possibility that state petition might ultimately *not* be found untimely by state courts.

In such a situation the inmate has wasted his limited resources, and the resources of the federal court, and is still subject to a state court finding of untimeliness.

CONCLUSION

For the reasons stated, the decision of the Ninth Circuit Court of Appeals should be reversed. Petitioner should be granted relief from the dismissal order, and should be permitted to proceed with his meritorious federal constitutional claims.

Date: July 29, 2010

Respectfully submitted,

CHARLES M. BONNEAU
Attorney for Petitioner

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROMEL VALENTINO WHITE, *Petitioner-Appellant,* v. MIKE MARTEL, Warden, *Respondent-Appellee.*	No. 08-16387 D.C. No. 2:06-cv-02840-JKS-EFB ORDER AND OPINION

Appeal from the United States District Court
for the Eastern District of California
James K. Singleton, Senior District Judge,
Presiding

Argued and Submitted
March 9, 2010 – San Francisco, California

Filed April 7, 2010

Before: J. Clifford Wallace, Susan P. Graber and M. Margaret McKeown, Circuit Judges.

Per Curiam Opinion

COUNSEL

Charles M. Bonneau, II, Esq., Sacramento, California, for petitioner-appellant Romel Valentino White.

Justain P. Riley, Esq., Deputy State Attorney General, Sacramento, California, for respondent-appellee Mike Martel, Warden.

ORDER

This order redesignates the memorandum filed on March 19, 2010, as a published per curiam opinion.

OPINION

PER CURIAM:

Petitioner White appeals from the district court's dismissal of his habeas petition as untimely. We review a district court's denial of a habeas corpus petition de novo. *Gonzalez v. Brown*, 585 F.3d 1202, 1206 (9th Cir. 2009). We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

I.

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) has a one-year statute of limitations for habeas cases by persons in custody pursuant to a state court judgment. 28 U.S.C. § 2244(d)(1). The AEDPA statute of limitations may be tolled for the time during which a "properly filed" state habeas petition is pending. *Id.* § 2244(d)(2). The Supreme Court has made it clear that "[w]hen a postconviction [habeas] petition is untimely under state law, that is the end of the matter for purposes of

§ 2244(d)(2)." *Pace v. DiGuglielmo,* 544 U.S. 408, 414 (2005) (internal quotation marks omitted). Such a petition is not "properly filed" so as to trigger statutory tolling. *Id.* at 417. We have held that, pursuant to *Pace,* tolling under section 2244(d)(2) is unavailable where a state habeas petition is deemed untimely under California's timeliness standards. *Bonner v. Carey,* 425 F.3d 1145, 1149 (9th Cir. 2005). Here, California state courts determined that White's state habeas petition was untimely under state law. Therefore, there was no "properly filed" state petition, and White was not entitled to statutory tolling of AEDPA's one-year statute of limitations during the time period when those state habeas proceedings were pending.

White argues that California's timeliness rule is not an "adequate" procedural bar because it is vague, ambiguous, and inconsistently applied. However, the adequacy analysis used to decide procedural default issues is inapplicable to the issue of whether a state petition was "properly filed" for purposes of section 2244(d)(2). *See Zepeda v. Walker,* 581 F.3d 1013, 1018 (9th Cir. 2009). White's reliance on procedural bar case law is misplaced. *Id.* at 1018 n.3. White is not entitled to statutory tolling of the AEDPA statute of limitations.

II.

White argues alternatively that equitable tolling should apply to render his federal habeas petition

timely. We construe this argument as a motion to expand the Certificate of Appealability in this case to include the issue of equitable tolling, and we grant the motion. *See* Ninth Circuit Rule 22-1(e). We review de novo the question of whether a statute of limitations should be equitably tolled. *Harris v. Carter*, 515 F.3d 1051, 1054 (9th Cir.), *cert. denied*, 129 S. Ct. 397 (2008).

White's primary argument for equitable tolling is that *Pace* overruled earlier Ninth Circuit case law and that, until this court's mandate issued in *Bonner*, he reasonably relied on earlier circuit precedent that would have tolled the AEDPA statute of limitations for the entire time that he was seeking state habeas relief. To qualify for equitable tolling, petitioners "must demonstrate that they have been pursuing their rights diligently and that some extraordinary circumstance stood in their way." *Roy v. Lampert*, 465 F.3d 964, 969 (9th Cir. 2006) (internal quotation marks and alterations omitted).

Bonner was decided on October 6, 2005. White's state petition was first held untimely on January 6, 2006. *Bonner's* mandate issued on March 20, 2006. Yet White waited until December 14, 2006-more than 14 months after *Bonner*, more than 11 months after the state superior court held his state petition untimely, and almost nine months after the *Bonner* mandate – to file his federal petition. The Supreme Court in *Pace* acknowledged that "a petitioner trying in good faith to exhaust state remedies may litigate in state court for years only to find out at the end that

he was never 'properly filed,' and thus that his federal habeas petition is time barred," but suggested that "[a] prisoner . . . might avoid this predicament . . . by filing a 'protective' petition in federal court and asking the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted." 544 U.S. at 416 (some internal quotation marks omitted). White insists that such a stay and abeyance might have been denied, and that this course of action would have been pointless or even detrimental. But by January 6, 2006, White had little to lose in filing in federal court and seeking a stay and abeyance, because by then he knew (a) that his state petition had been held untimely by the state superior court, and (b) that, under *Bonner*, the state court ruling of untimeliness would preclude tolling of the AEDPA statute of limitations – yet he waited until December 14, 2006, to act in federal court. Such a delay does not demonstrate the diligence required for application of equitable tolling. We hold that White's case does not warrant an application of equitable tolling.

White has asked that we take judicial notice of certain facts in support of his equitable tolling argument: (1) the *Bonner* docket sheet; (2) proceedings in another California habeas case; and (3) state bar records reflecting disciplinary proceedings against White's former counsel. Those facts are appropriate for judicial notice, and we therefore grant White's request. *See United States v. 14.02 Acres of Land*, 547 F.3d 943, 955 (9th Cir. 2008); *Dawson v.*

Mahoney, 451 F.3d 550, 551 n.1 (9th Cir. 2006) (order); *Corder v. Gates,* 104 F.3d 247, 248 n.1 (9th Cir. 1996). However, the facts that are the subject of White's requests for judicial notice do not alter our analysis of his entitlement to equitable tolling.

III.

Finally, White argues that, as to one of his state habeas claims, the state superior court did not make an untimeliness finding but instead dismissed the claim on its merits; therefore, statutory tolling operates to render his federal habeas petition timely as to that claim. We do not reach this argument. White does not appear to have made this argument in the district court; his opposition to the motion to dismiss does not suggest that one claim in his state habeas petition might stand in a different legal posture than the others as to untimeliness. Generally, arguments not raised before the district court are waived on appeal. *O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1063 n.3 (9th Cir. 2007). Also, this issue is not encompassed by the Certificate of Appealability, and we will not expand the certificate to include it.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROMEL VALENTINO WHITE, Petitioner, vs. RICH SUBIA,[1] Warden, Mule Creek State Prison, Respondent.	No. 2:06-cv-02840-JKS-EFB ORDER

Petitioner Romel Valentino White, a state prisoner appearing through counsel, has filed this application for a writ of habeas corpus under 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge under 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On February 19, 2008, the Magistrate Judge filed Findings and Recommendations, which were served on all parties and which contained notice to all parties that any objections to the Findings and Recommendations were to be filed within twenty days. Petitioner has filed objections to the Findings and Recommendations.

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[1] Rich Subia, Warden, Mule Creek State Prison, substituted for Roseanne Campbell, Acting Warden, Mule Creek State Prison. Fed. R. Civ. P. 17(d).

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this Court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, with particular attention to those portions relevant or pertinent to the objections raised, the Court finds the Findings and Recommendations to be supported by the record and by proper analysis.

White raises two objections to the Findings and Recommendations. First, White asserts that the California "timeliness rule" is not firmly established or consistently applied and he is entitled to statutory tolling. Second, White argues that he is entitled to equitable tolling through October 6, 2005, the date that the Ninth Circuit handed down its decision in *Bonner v. Carey,* 425 F.3d 1145 (9th Cir. 2005). Neither objection is well taken.

His first objection is foreclosed by *Pace v. DiGulielmo,* 544 U.S. 408, 414 (2005). *Pace,* addressing what had been intimated in *Carey v. Saffold,* 536 U.S. 214 (2002),[2] specifically held "[w]hen a post-conviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)." In *Bonner,* the Ninth Circuit recognized that *Pace* implicitly overruled the post-remand determination in *Saffold v. Carey,* 312 F.3d 1031, 1035 (9th Cir. 2002) (*Saffold II*), that the initial five-year delay in filing the

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[2] Reversing and remanding *Saffold v. Newland,* 250 F.3d 1262 (9th Cir. 2000) (*Saffold I*).

petition in the lower state court was irrelevant to whether the petition was properly filed under AEDPA, stating "it is clear that the five-year delay in *Carey* was relevant to our analysis." The California Courts having held that the petitions filed in those courts were untimely under California law, "§ 2244(d)(2) does not allow for tolling." *Bonner,* 425 F.3d at 1149. The Magistrate Judge was correct on this point.[3]

White did not raise his second objection, that he is entitled to equitable tolling, in his opposition to the motion to dismiss. Although normally the Court will not address issues raised for the first time in the objections to Findings and Recommendations, the Court has considered this objection and finds it to be without merit.[4]

White relies by analogy on the recent decision of the Ninth Circuit in *Harris v. Carter,* 515 F.3d 1051 (9th Cir. 2008). In *Harris* the Ninth Circuit, noting that *Pace* overturned existing Ninth Circuit precedent that an untimely Washington State post-conviction petition was properly filed for purposes of tolling the

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[3] White's reliance on *King v. Lamarque,* 464 F.3d 963 (9th Cir. 2006), and *Bennett v. Mueller,* 322 F.3d 573 (9th Cir. 2003), is misplaced. *King* and *Bennett* are inapposite as they dealt with the "independent state law grounds" doctrine, not whether a petition was "properly filed" in the state court issue presented in this case, an entirely separate and distinct concept.

[4] The case relied on by White, *Harris v. Carter,* 515 F.3d 1051 (9th Cir. 2008), was decided after the matter was submitted for decision and just 20 days before the Magistrate Judge filed his Findings and Recommendations.

limitation period, *Dictado v. Ducharme,* 244 F.3d 724, 727-28 (9th Cir. 2001), held that, because he relied on existing controlling precedent, Harris was entitled to equitable tolling. White argues that the rationale of *Harris* ought to be extended to this case. The Court disagrees. The question presented in *Harris* was: "whether we should strictly apply the Supreme Court's rule announced in *Pace* on a retroactive basis, or whether we should grant equitable tolling given Harris' reliance on our controlling precedent in *Dictado*." *Harris,* 515 F.3d at 1054.[5]

Harris filed three successive petitions for post-conviction review. The first, filed in February 2001, 267 days after his conviction became final, was ultimately denied by the Washington Supreme Court February 4, 2004. The second petition was filed 29 days later on March 4, 2004, and was held to be untimely, as was his third filed October 11, 2004, ultimately held to be untimely by the Washington Supreme Court on June 1, 2005. Harris filed his habeas petition in the federal court on May 11, 2005. Under *Dictado* the time his untimely petitions were pending before the Washington courts would be tolled, under *Pace,* that time was not.[6] Consequently,

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[5] White has not identified the specific controlling decision that he relied on in delaying filing his federal habeas petition. The Court assumes that it was the post-remand *Saffold II* decision implicitly overruled by *Pace*.

[6] The panel noted that Harris' petition became time-barred the moment *Pace* was decided. *Harris,* 515 F3d at 1056.

if time were computed under *Dictado,* the petition was timely; if computed under *Pace,* it was not. Thus, the panel, in reversing and remanding, held "[e]quitable principles dictate that we toll AEDPA's statute of limitations in the rare case where a petitioner relies on our legally erroneous holding in determining when to file a federal habeas petition." *Harris,* 515 F.3d at 1057.

The facts in this case differ materially. *Pace* was decided April 27, 2005, 106 days after White's conviction became final (January 11, 2005). *Bonner* was decided October 6, 2005. White did not file his first petition for post-conviction relief in the California courts until November 16, 2005, 203 days after *Pace* was decided and 41 days after *Bonner.* At the time *Bonner* was decided, White still had 107 days, until January 12, 2006, to file his petition in the federal courts, even if no part of the one-year limitation period were tolled; and 213 days, until April 28, 2006, if the time between the date his conviction became final and the date *Pace* was decided were tolled under *Harris.* Thus, White could have filed a protective petition for relief under § 2254 and requested this Court to hold the petition in abeyance pending exhaustion of his claims in the state courts, preserving his claims. *See Rhines v. Weber,* 544 U.S. 269, 277-78 (2005).

The Court is not unmindful of the fact that in *Harris* the Ninth Circuit did not find the fact that the petitioner could file a protective petition dispositive. *Harris,* 515 F.3d at 1055.

> The fact that Harris *could* have filed a timely federal habeas petition at a certain point in time is not dispositive. The critical fact here is that Harris relied in good faith on then-binding circuit precedent in making his tactical decision to delay filing a federal habeas petition. Harris' failure to file a timely petition is not the result of oversight, miscalculation or negligence on his part, all of which would preclude the application of equitable tolling. (Citation omitted). Harris was undoubtedly aware of when AEDPA's statute of limitations would expire under our rule in *Dictado*. Harris presumably chose his tactical strategy precisely *because* he believed that, under *Dictado*, he could pursue relief in state courts without jeopardizing his ability to file a federal habeas petition. (Emphasis in the original)

The situation is markedly different in this case. *Pace* made clear that a petition is not "properly filed" in the state court (1) when untimely under state law and (2) the fact that state law provides for exceptions to its timeliness rule does not prevent a late application from being untimely. *Pace,* 544 U.S. at 413-14. As noted in *Bonner,* these holdings implicitly overruled *Saffold II*. At the very least, at the time it was decided, *Pace* cast serious doubts on the continued viability of *Saffold II* and that continued reliance on that decision was questionable. While White was undoubtably aware of *Saffold II, Pace* put White on notice that continued reliance on *Saffold II* was more likely than not misplaced. The fact that the Ninth

Circuit did not "officially" recognize *Saffold II* was overruled until it handed down its decision in *Bonner* does not assist White.[7] Unlike *Harris,* under the facts and circumstances of this case, the Court cannot presume that White chose his tactical strategy based upon a good faith reliance on *Saffold II.* White waited 13 months after the California Supreme Court affirmed his conviction before filing his first habeas petition in the state courts, which was denied as untimely on January 6, 2006. White did not at any time file a protective federal habeas petition, notwithstanding that at least colorable grounds existed to hold a petition in abeyance. *See Pace,* 544 U.S. at 416 ("petitioner's reasonable confusion about whether a state court filing would be timely will ordinarily constitute 'good cause' for him to file in federal court").

The Court is also not unmindful of the fact that the Ninth Circuit in *Bonner* remanded the matter to the district court to address the issue of whether Bonner was entitled to equitable tolling. Again, the facts materially differ in this case. Bonner filed his

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[7] In this case the change in the controlling law was the result of a decision by the Supreme Court construing § 2244(d)(2). "[W]hen [the Supreme] Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 313 n.12 (1994). *See also Harper v. Virginia Dept. of Taxation,* 509 U.S. 86, 90 (1993) ("[W]e hold that this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision.").

petitions in both the state courts and the federal court before *Pace* was decided, not, as here, after. Under those facts, *Harris* could apply, and Bonner may be entitled to equitable tolling. Like Harris, Bonner's petition became untimely the moment *Pace* was decided. On January 6, 2006, the date his first state court habeas petition was denied as untimely, White was presumably aware of the *Bonner* decision that an untimely state court filing did not toll the running of the one-year limitation period. Although the *Harris* rationale might possibly apply to the first filing and toll the running of White's time, excluding those 52 days; unquestionably the time starting running again on January 7, 2006. On that date, assuming that the time was tolled until *Pace* was decided, 203 days had lapsed, leaving White 162 days within which to file a federal habeas petition. White filed his petition in this Court on December 14, 2006, 341 days later.[8] Thus, at best, giving White the benefit of all periods during which the time may have been equitably tolled, the petition in this Court was filed 179 days late.

Even if the Court were to accept White's argument that the limitation period was tolled until *Bonner* was decided, October 6, 2005, White cannot prevail. In that situation, without further tolling, White's time to file a federal habeas petition expired

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[8] White incorrectly states the filing date was November 16, 2005.

October 7, 2006, 68 days before he filed his petition. White does not argue that any of the time after October 6, 2005, was tolled, other than as set forth in his first objection, which was foreclosed by *Bonner,* if not earlier by *Pace*.[9]

Accordingly, IT IS HEREBY ORDERED THAT:

1. The Findings and Recommendations filed February 19, 2008, as supplemented herein, are adopted;

2. Respondent's Motion to Dismiss at Docket No. 10 is GRANTED;

3. Petitioner's application for a writ of habeas corpus is DISMISSED; and

4. The Clerk of the Court to enter final judgment accordingly.

IT IS FURTHER ORDERED THAT the Court declines to issue a Certificate of Appealability. 28 U.S.C. § 2253(c); *Slack v. McDaniel,* 529 U.S. 473, 484

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[9] The Court notes in passing that White attempts to tie *Harris* to the *King/Bennett* holdings *vis-a-vis* the inconsistent application of the California timeliness rule under *In re Robbins*, 18 Cal.4th 770 (1998), and *In re Clark*, 5 Cal.4th 750 (1993). White incorrectly suggests that Harris was premised upon the basis that, prior to *Pace*, Harris was entitled to rely on the previous Ninth Circuit rule that permitted statutory tolling regardless of a state court finding that the petition was untimely under *Robbins* and *Clark*. *Harris*, however, arose out of a Washington, not California, conviction. The prior Ninth Circuit holding addressed in *Harris*, *Dictado*, concerned Washington law, not *Robbins/Clark*.

(2000) (a COA should be granted where the applicant has made "a substantial showing of the denial of a constitutional right," *i.e.*, when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further") (internal quotation marks and citations omitted). Any further request for a Certificate of Appealability must be addressed to the Court of Appeals. *See* Fed. R. App. P. 22(b); Ninth Circuit R. 22-1.

Dated: May 30, 2008.

s/ James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROMEL VALENTINO WHITE,

Petitioner,

vs.

RICH SUBIA, Warden,

Respondent. /

No. CIV S-06-2840 RRB EFB P

FINDINGS AND RECOMMENDATIONS

Petitioner is a prisoner with counsel seeking a writ of habeas corpus. *See* 28 U.S.C. § 2254. This action proceeds on the December 13, 2006, petition. Respondent moves to dismiss this action upon the ground it is untimely. Petitioner opposes. For the reasons explained below, the court finds that the petition is untimely and the motion must be granted.

I. Procedural History

On April 17, 2000, petitioner was convicted of a multitude of counts of lewd and lascivious acts on a minor. Resp.'s Mot. to Dism., Docs. Lodged in Supp. Thereof ("Lod. Doc.") 1. He appealed, and on July 28, 2004, the appellate court affirmed the judgment. Lod. Doc. 2. On September 7, 2004, petitioner filed a petition for review in the California Supreme Court. Lod. Doc. 3. On October 13, 2004, review was denied. Lod. Doc. 4.

Following this denial, petitioner commenced state post-conviction proceedings. Thus, on November 16, 2005, petitioner filed a petition for a writ of habeas corpus in the trial court. Lod. Doc. 5. On January 6, 2006, the trial court denied relief in an order explaining that "[t]he petition is untimely," and citing *In re Clark,* 5 Cal.4th 750, 787-798 (1993) and *In re Robbins,* 18 Cal.4th 770, 811-812, 812 fn. 32 (1998). Lod. Doc. 6. On February 14, 2006, petitioner filed an application for state habeas relief in the appellate court, and that application summarily was denied on February 24, 2006. Lod. Docs. 7, 8. On March 13, 2006, petitioner filed a petition for a writ of habeas corpus in the California Supreme Court. Lod. Doc. 9. On November 15, 2006, the court denied relief based on *In re Robbins,* 18 Cal.4th 770, 780 (1998)

II. Standards

A one-year limitation period for seeking federal habeas relief begins to run from the latest of the date the judgment became final on direct review, the date on which a state-created impediment to filing is removed, the date the United States Supreme Court makes a new rule retroactively applicable to cases on collateral review or the date on which the factual predicate of a claim could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1). The judgment on direct review becomes final when the 90-day limit for filing a petition for certiorari expires. *Bowen v. Roe,* 188 F.3d 1157, 1159 (9th Cir. 1999). By statute, the period is tolled for

"[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending. . . . " 28 U.S.C. § 2244(d)(2). An application is "properly filed" when its delivery and acceptance comply with the applicable laws and rules governing filings. *Artuz v. Bennet*, 531 U.S. 4, 8 (2000). An untimely state post-conviction application is not "properly filed." *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005). In California, a properly-filed post-conviction application is "pending" during the intervals between a lower court decision and filing a new petition in a higher court. *Carey v. Saffold*, 536 U.S. 214, 223 (2002). Petitioner has the burden of showing facts entitling him to statutory tolling. *Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir. 2002).

III. Analysis

As noted, respondent contends that the petition was filed beyond the one-year limitation period. He asserts that petitioner cannot show that he is entitled to statutory tolling. Petitioner contends that the application is timely, asserting that he is entitled to statutory tolling.

Any consideration of whether the petition is timely must begin with when the conviction became final. There is no dispute that the judgment was final on January 11, 2005, 90 days after the California Supreme Court denied the petition for review. Thus, petitioner had until January 11, 2006, to file his

federal habeas petition. Absent tolling, the December 13, 2006, petition is 336 days late. Obviously then, the ten days during which petitioner's application was under consideration in the appellate court does not help petitioner. To avoid dismissal, petitioner must demonstrate that he is entitled to statutory tolling as contemplated in *Saffold*. If he benefits from such tolling, the petition will be deemed filed 29 days before time to do so expired.

Petitioner asserts that he is entitled to statutory tolling for the entire time he sought state post-conviction relief. Respondent asserts he his not entitled to tolling for this time because he did not "properly file" his petitions in the state trial and appellate courts. Respondent relies on the rule of *Pace,* 544 U.S. at 414, i.e., an untimely state post conviction application is not properly filed. Since both the trial court and the California Supreme Court denied relief on the ground that the petitions were untimely, neither was "properly filed" for purposes of the federal limitation period. Petitioner argues that this court cannot defer to any finding that the petitions were untimely because California's timeliness rules for habeas applications are not adequate and independent to bar review of his claims. The court finds that petitioner's argument, while carrying some surface appeal, must fail. Petitioner relies on a body of habeas law that is wholly inapplicable to any analysis of the statute of limitations, at least as the law stands now. Nor is this law likely to change any time soon. The United States Supreme Court has

distinguished between "conditions to filing," and "procedural bars." *Artuz v. Bennet,* 531 U.S. 4, 8 (2000). A "procedural bar" arises when a state prisoner has failed to comply with a state procedure that is necessary to obtain review in state court. Once the prisoner defaults the rule, the federal court is barred from reviewing any claim lost by virtue of the default. Thus, the United States Supreme Court has held that:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). State prisoners asserting that their custody violates federal law must first present their claims to the state courts. *See Braden v. 30th Judicial Circuit Court of Kentucky,* 410 U.S. 484, 490-91 (1973) (noting that the exhaustion requirement is meant to "protect the state courts' rule in enforcement of federal law and prevent disruption of state judicial proceedings."). The procedural default doctrine is meant to ensure that state prisoners comply with a state's procedural requirements for presenting his federal claims to those courts. *Coleman,* 501 U.S. at 731-32. Otherwise, state prisoners could avoid state

review of their federal claims, which would be "unseemly in our dual system of government." Id., at 731. While the Anti-Terrorism and Effective Death Penalty Act in a broad sense is grounded in concerns of finality, comity and federalism, *see Williams v. Taylor,* 529 U.S. 420, 436 (2000), the statutory tolling provision in the limitations period is meant to accommodate these concerns. *Duncan v. Walker,* 533 U.S. 167, 179-80 (2001) (noting that statutory tolling "promotes the exhaustion of state remedies by protecting a state prisoner's ability to later apply for federal habeas relief' despite the one-year limitation period); *see also Saffold,* 536 U.S. at 223 (statutory tolling is intended "to give States the opportunity to complete one full round of review, free of federal interference."). California clearly uses its timeliness requirements as a procedural mechanism for declining to review claims. *See Bennett v. Mueller,* 322 F.3d 573, 579-80 (9th Cir. 2003). While state procedural bars are not conditions to filing, but rather are conditions to obtaining relief, *Artuz,* 531 U.S. at 8, a state's time limit for filing, even if utilized as a procedural bar, is a condition to filing for purposes of the federal limitations period. *Pace,* 544 U.S. at 417 ("[W]e hold that time limits, no matter their form, are 'filing conditions."). Here, both the trial and appellate courts found that petitioner's state habeas applications were not timely. Under the applicable precedent, this court finds that they were not "properly filed" for purposes of 28 U.S.C. § 2244(d)(2). Thus, petitioner does not benefit from statutory tolling, and

the court finds that his federal petition is untimely. Respondent's motion must be granted.

IV. Conclusion

For the reasons explained, the court finds that the December 13, 2006, federal petition was filed beyond the time permitted under the statute of limitations and the petitioner has not established that he is entitled to equitable tolling.

Accordingly, it is hereby RECOMMENDED that respondent's August 3, 2007, motion to dismiss be granted and that this action be dismissed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan,* 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst,* 951 F.2d 1153 (9th Cir. 1991). Dated: February 19, 2008.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE/TIME	**: JANUARY 6, 2006**	**DEPT. NO:**	**40**
JUDGE	**: JAMES L. LONG**	**CLERK**	**: T. BROWN**
REPORTER	**: NONE**	**BAILIFF**	**: NONE**

In Re: **Case No.: 05F10226**

Romel Valentino White

On Habeas Corpus

Nature of Proceedings: PETITION FOR WRIT OF HABEAS CORPUS – ORDER

The petition for writ of habeas corpus has been filed and considered.

IT IS ORDERED that the petition for writ of habeas corpus is DENIED.

More than one year after the judgment in Sacramento County Superior Court Case No. 96F07937 became final, petitioner has filed the instant habeas corpus petition to challenge that judgment.

The petition is untimely. An untimely state habeas corpus petition is an abuse of the writ of habeas corpus, and if unjustified, is barred from habeas corpus review unless (1) it alleges facts which, if proven, would establish that a fundamental

miscarriage of justice occurred as a result of the proceedings leading to conviction, (2) the petitioner is presenting newly discovered claims after demonstrating due diligence (*In re Robbins* (1998) 18 Cal.4th 770, 811-812, 812 fn. 32; *In re Clark* (1993) 5 Cal.4th 750, 774-775), or (3) the petitioner is claiming that the sentence is unlawful, as an unlawful sentence may be corrected at any time (*People v. Welch* (1993) 5 Cal.4th 228). Only the following represent a "fundamental miscarriage of justice" for these purposes: (1) an error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner, (2) the petitioner is actually innocent of the crime or crimes of which the petitioner is convicted, (3) the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury would have imposed the sentence of death, or (4) the petitioner was convicted or sentenced under an invalid statute (*In re Robbins, supra,* 18 Cal.4th 770, 811-812, 812 fn. 32; *In re Clark, supra,* 5 Cal.4th 750, 787-798).

Petitioner first claims that he has only recently obtained statements from two witnesses, Katrese King and Mickey Betti, that should be considered newly discovered evidence. He explains only that these witnesses were "extraordinarily hard to locate," and that counsel "was only recently able to locate them and secure their signatures." In support he

attaches short affidavits from them, signed only recently in the fall of 2005. Katrese's affidavit attests under penalty of perjury that the victim, Jermaine J., had told her that he had made up the charges against petitioner and that it had been Jermaine's brother and not petitioner who had been molesting him. Katrese further attests that Jermaine threatened her into not testifying in support of petitioner at the trial. Katrese also attests telling all of this to a defense investigator in a statement attached to the affidavit, dated 1999.

Mickey Betti, in his affidavit, attests that he gave false testimony at trial and did so because he was angry at petitioner and was pressured by police detectives. He attests that he recanted his testimony to a defense investigator, a copy of which is attached to the affidavit. That appears to also have been given to the defense investigator about the same time period as Katrese's, as it is similar in appearance and contains numbering at the bottom right as if numbered as part of the record for the case. Betti also attests that he wrote a letter to petitioner, attempting to recant. The original of the letter is attached to the declaration, with an original blue sticker for it to be used as a defense exhibit in the case. Betti attests, however, that he was informed that defense counsel withdrew the letter from evidence.

Neither affidavit constitutes newly discovered evidence. Petitioner's trial defense counsel was apparently well aware of the recantations of these witnesses, at the time of trial. Indeed, Mickey was

even impeached at trial, for not admitting to defense investigators that petitioner and he got into fist-fights over Mickey's refusal to have sex with petitioner, and testified at trial that he was pressured by law enforcement investigators and told them what they wanted to hear but was not pressured by defense investigators.

Nor does petitioner now detail any attempts to locate these witnesses and obtain their Fall 2005 affidavits at an earlier point in time during the past five years since conviction. Not having stated or made any specific showing of due diligence, it cannot be concluded that these not constitute newly discovered evidence. As such, the *Robbins/Clark* bar applies.

Nor does petitioner show any exception to the *Robbins/Clark* bar, even of actual innocence, which requires that the evidence for particular claim be such that it would undermine the entire prosecution case and point *unerringly* to innocence or reduced culpability (*Clark, supra,* 5 Cal.4th 750, 797 fn. 32 [with regard to "error of constitutional magnitude"], 798 fn. 33 [with regard to "actual innocence"]). Further with regard to actual innocence, evidence relevant only to an issue already disputed at trial, which does no more than conflict with trial evidence, does not constitute new evidence that fundamentally undermines the judgment. Rather, the evidence must be of innocence that could not have been and cannot now be refuted; showing that the evidence might have raised a reasonable doubt is not sufficient (*Clark, supra,* 5 Cal.4th 750, 797 fn. 33).

Nor would it appear that even if the claim were not barred under *Robbins/Clark,* that either witness's current statement would have made a difference in the outcome of the trial. Petitioner's parents were charged with attempting to bribe the victim and dissuade him from testify and instead to recant his accusations against petitioner; those charges were tried together at petitioner's trial, and the jury convicted the parents of the charges. The victim also, at one point in time, gave an audiotaped interview to a defense investigator, recanting his statements to law enforcement. One of the parents then continued to urge the victim to state that he had fabricated his reports against petitioner. And, yet another witness, petitioner's niece Takeema, testified at trial that the victim had denied to her ever having been molested by petitioner. In light of this evidence, any recantation the victim may have made to Katrese during probably the same time period was not reasonably likely to have been believed by the jury, which disbelieved the victim's other recantation and convicted petitioner's parents on the witness-tampering charges.

Further, Mickey's recantation to the defense investigator was not likely to have been believed, as Mickey continued to admit most of his version of events except for the specific sex acts themselves. It also appears that Mickey was examined on the witness stand about the statements he made to both law enforcement and defense investigators. As two other young men also testified at trial about their

own sexual relationships with petitioner or observations of petitioner's sexual relationships with other boys, it was likely that the jury would have rejected Mickey's recantation and believed his trial testimony over his recent statement and his statement given two years ago to a defense investigator, and believed the testimony of the two other boys and the testimony of the victim himself. Plus, there was evidence of the flight of petitioner to Mexico to avoid prosecution, as well as the flight of his parents. The evidence was simply overwhelming against petitioner, and the recantations not believable.

The first claim, therefore, is denied.

Petitioner next claims that he received ineffective assistance of appellate counsel, in failing to argue in a petition for review that nine of the counts of which he was convicted were barred by the statute of limitations under *Stogner v. California* (2003) 539 U.S. 607, because they occurred before January 1, 1988.

Although subject to the *Robbins/Clark* untimeliness bar, it would appear that this claim is of a type that arguably meets an exception to that bar, of an error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner. This court need not decide whether it actually constitutes such an exception, however, because the claim fails in any event, as discussed below.

The Third District Court of Appeal, in the appeal in the case, noted that the only conduct affected by *Stogner* in this case was that of conduct between September 20, 1987 and January 1, 1988. As for conduct on and after January 1, 1988, the victim had testified that petitioner sodomized the victim at least once a month during second and third grades, which was from 1988 until 1990, and that petitioner initiated sex acts with him anywhere from once a day to once a month from 1989 to 1990. Even if the sex acts had occurred only once a month from 1988 through September 1990, that was still 31 months, meaning 31 acts; petitioner was convicted on 30 counts. Nor was there any evidence to distinguish the conduct that occurred before or after January 1, 1988. The evidence was presented as an all-or-nothing choice, and the Third District found under these circumstances that the evidence was sufficient to support 30 counts that took place on or after January 1, 1988, so as not to be time-barred.

Petitioner now claims that other testimony from petitioner's brother and petitioner's college transcripts show that petitioner could not have molested the victim after September 1989. Petitioner, however, fails to attach reasonably available trial transcript to support his claim. In any event, such evidence could have been disbelieved or ignored by the jury, which may have found that petitioner, even if at college, had come to visit the victim regularly.

Petitioner simply fails to present any reason why this court should reach a conclusion any different

from that reached by the Third District Court of Appeal on the *Stogner* issue.

Petitioner also claims that the Third District Court of Appeal inappropriately placed the burden of producing evidence on the statute of limitations issue on petitioner, instead of on the prosecution.

The opinion issued by the Third District in the case, however, does not appear to do so. Rather, the Third District noted that petitioner failed to file a supplemental brief on the issue, and that the Attorney General submitted a letter brief pointing to evidence of conduct after January 1, 1988, which the Third District then recounted.

Petitioner also claims that appellate counsel was ineffective in failing to file a supplemental brief on the statute of limitations issue. Petitioner, however, fails to show that had appellate counsel done so, it would have been reasonably likely to have made a difference in the outcome of the issue, requiring denial of this claim as well (*Strickland v. Washington* (1984) 466 U.S. 668).

It is not reasonably probable that a different outcome would have been reached by the California Supreme Court on any of the *Stogner* issues that petitioner now raises, had the matter been raised by appellate counsel in a petition for review.

For all of these reasons, the statute of limitations claims are denied.

Petitioner next claims that he received ineffective assistance of appellate counsel, in failing to argue in a petition for review that the trial court erred in allowing a juror to remain on the jury, even though during deliberations the juror admitted watching a television program, "America's Most Wanted," that reported on petitioner's case.

The claim is barred by *Robbins/Clark,* as being untimely. Petitioner fails to set forth an exception to that bar. Regardless, the claim is meritless, as discussed below.

The Third District Court of Appeal, in reviewing the claim on appeal, noted that only one juror had stated that the juror in question had said he refused to deliberate because he had seen the show and had already made up his mind. The Third District noted that the other jurors had said that the juror in question and said only that he had seen petitioner on the program and nothing more, and that the juror in question had not made up his mind as a result of seeing the program. The Third District noted that the trial court found that the lone juror who had stated otherwsie was lying, and that the accusation had surfaced only after this lone juror was removed as foreperson at the suggestion of the juror in question. The trial court had found no misconduct, but did order the jury to reconsider the 34 verdicts already reached and reminded them of their duty to decide the case based solely on the evidence presented at trial. The Third District found it hard to imagine a more diligent or thorough exercise of discretion of the

trial court, and upheld the trial court's finding of no misconduct, no bias, and no possible prejudice.

Petitioner does not present any reason to reach a conclusion any different from that reached by the Third District Court of Appeal on this issue. He attempts to argue a reexamination of the evidence itself, but it is clear that the Third District made a thorough review of the matter. As it is not reasonably probable that a different outcome would have been reached by the California Supreme Court had this matter been raised by appellate counsel in a petition for review, the claim fails.

Petitioner next claims that his trial counsel was ineffective in failing to move to sever his trial from that of his parents.

The claim is barred by *Robbins/Clark*, as being untimely. Petitioner fails to set forth an exception to that bar.

Regardless, the claim is meritless. Even if a motion had been made and granted, because petitioner was not charged in a common charge with his parents, it would not have made a difference in the outcome in his case, as the evidence of the witness tampering by his parents would have been introduced at petitioner's trial in any event. The parents were charged with attempting to persuade the victim to change his story and not testify against petitioner. Any such evidence directly impacted the credibility of the victim on any testimony or statement that he had given, some of which recanted and others that did

not. As the evidence would have been admitted in any event, there was no reasonable probability in a difference in the outcome had the trials been severed, requiring denial of the ineffective assistance of counsel claim *(Strickland, supra).*

Petitioner next claims that his trial counsel was ineffective in failing to object to the prosecutor's use of leading questions in an attempt to satisfy the statute of limitations.

The claim is barred by *Robbins/Clark,* as being untimely. Petitioner fails to set forth an exception to that bar.

Regardless, the claim is meritless. *Stogner* had not yet been decided at the time of trial. Nor would objection ultimately have made any difference, because the prosecutor simply would have rephrased the questions until the answers being sought were given. Nor is it clear that any objection would have been sustained, as the victim had recanted in other statements and could arguably have been portrayed as a hostile witness. Thus, even if not untimely, the claim would fail in any event.

The petition is barred as untimely and is meritless in any event, thus it is denied.

Dated: January 6, 2006 /s/ **JAMES L. LONG**
Honorable JAMES L. LONG,
Judge of the Superior
Court of California,
County of Sacramento

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the PETITION FOR WRIT OF HABEAS CORPUS – ORDER in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

Charles M. Bonneau
331 'J' Street, Ste. 200
Sacramento, CA 95814

Dated: 1-6-05

Superior Court of California,
County of Sacramento

By: T. BROWN
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROMEL VALENTINO WHITE, Petitioner-Appellant, v. MIKE MARTEL, Warden, Respondent-Appellee.	No. 08-16387 D.C. No. 2:06-cv-02840-JKS-EFB Eastern District of California, Sacramento ORDER (Filed May 3, 2010)

Before: WALLACE, GRABER and McKEOWN, Circuit Judges.

The Petition for Panel Rehearing is DENIED.

Judge Graber and Judge McKeown have voted to deny the Petition for Rehearing En Banc, and Judge Wallace so recommends.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's Petition for Rehearing En Banc is DENIED.

Appellant's request to recall the mandate is denied as moot.